5-14-08

No. 07-991

In the Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

NAOMI C. EARP, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Chair of the Equal Employment Opportunity Commission (EEOC) was entitled to summary judgment on petitioner's claim that the agency discriminated against him in violation of Title VII of the Civil Rights Act of 1964.

2. Whether the court of appeals correctly held that the EEOC was entitled to summary judgment on petitioner's claim that the agency retaliated against him in violation of Title VII.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is not published in the *Federal Reporter* but is reprinted in 239 Fed. Appx. 114. The orders of the district court granting respondents' motion for summary judgment (Pet. App. 56a) and denying petitioner's motion for reconsideration (Pet. App. 54a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2007. A petition for rehearing was denied on September 27, 2007 (Pet. App. 1a-2a). On December 5, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 25, 2008, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a black native of Nigeria who emigrated to the United States in 1980. Pet. App. 4a. He began work for the Equal Employment Opportunity Commission (EEOC) in April 1994 as an investigator in its Detroit, Michigan office. *Id.* at 4a-5a. In 1997, petitioner applied for and received a position as an administrative judge in the EEOC's Memphis, Tennessee office. *Id.* at 5a. Shortly after his move to Memphis, petitioner was hospitalized after a white supremacist assaulted him at a gas station. *Ibid.* Petitioner had originally planned for his wife and daughter to join him in Memphis, but as a result of the attack, his wife refused to move and demanded that he return to Detroit. *Ibid.* Petitioner at first refused, but ultimately decided to seek a hardship transfer back to Detroit when his daughter began experiencing health problems. *Ibid.*

In a letter dated February 3, 1998, EEOC headquarters informed petitioner that it was unable to grant his transfer request. Pet. App. 6a. After consulting with the director of the Memphis office, the reviewing EEOC official determined that the needs of that office were too great for petitioner to leave. *Id.* at 5a-6a. The letter stated that the EEOC would "be happy to reconsider [petitioner's] transfer request" if there were a change in workload and staffing at the Memphis office. *Id.* at 6a. The Memphis director explained to petitioner that, due to the office's backlog, his continued presence would be necessary for at least six months, and petitioner "reluctantly agreed to this arrangement." *Ibid.*

Approximately six months later, petitioner met again with the Memphis director. Pet. App. 6a. Petitioner's daughter had been diagnosed with scoliosis. *Ibid.* Petitioner expressed his willingness to accept any position in Detroit, including temporary administrative judge or even investigator. *Ibid.* Petitioner submitted a second transfer request to EEOC headquarters, and traveled there to discuss his concerns with agency officials. *Id.* at 7a. They informed him that the low workload in Detroit rendered a transfer there impossible, but suggested that he consider a transfer to Indianapolis, which would bring him closer to Detroit. *Id.* at 7a-8a.

In a September 8, 1998, letter, agency headquarters formally denied petitioner's second request for a transfer to Detroit on the ground that such a transfer "would 'not be possible . . . at this time.'" Pet. App. 8a. In the months following the denial, petitioner began to complain to the Memphis director that he was receiving discriminatory treatment. *Id.* at 9a. In September 1999, roughly a year after the denial of his second transfer request, petitioner learned that a white investigator, who had previously moved from Detroit to Albuquerque, had received a transfer back to Detroit for family reasons despite a history of performance problems. *Ibid.* Petitioner renewed his request for a transfer, asking headquarters officials and the director of the Detroit office about vacancies and workload in Detroit. *Ibid.* Petitioner asserted that agency officials informed him that the situation had not changed, and continued to deny his transfer request. *Id.* at 9a-10a.

In October 1999, petitioner contacted an equal employment opportunity (EEO) counselor, alleging that the transfer denials were discriminatory. Pet. App. 10a. On November 24, 1999, he filed a formal EEO complaint,

claiming that the agency had discriminated against him on the basis of race, color, national origin, gender, and disability, and had retaliated against him for the exercise of protected rights. *Ibid.* In April 2000, the agency offered petitioner a transfer to an administrative judge position in Indianapolis, which he accepted. *Id.* at 11a. Petitioner claims that he accepted the transfer based on agency officials' representations that he would be transferred to Detroit as soon as a position became available. *Ibid.*

Petitioner sent another letter to EEOC headquarters on May 25, 2000, again requesting a hardship transfer to Detroit. Pet. App. 11a. He and his attorney wer to EEOC headquarters to discuss this latest request in person; EEOC informed him that a transfer would be impossible due to the Detroit office's budgetary constraints and lack of a vacancy. *Id.* at 11a-12a. The EEOC also responded negatively to oral inquiries regarding a transfer to Cleveland or back to Memphis, stating that the former office was overstaffed and the latter lacked a sufficient budget. *Id.* at 12a. On June 27, 2000, petitioner's most recent request for a transfer to Detroit was formally denied on the ground that no funded vacancies existed in that office. *Ibid.* Petitioner requested reconsideration and submitted yet another transfer request; in a letter dated August 24, 2000, the EEOC informed petitioner that Detroit's vacancy situation had not changed. *Ibid.* Petitioner then took a medical leave of absence for depression and work-related stress from September 2000 to April 2001. *Ibid.*

Soon after petitioner returned in April 2001, the EEOC received funding for a permanent administrative judge position in the Detroit office. Pet. App. 12a. Petitioner applied and was considered along with other ap-

plicants, but the EEOC eventually selected the candidate who had been filling the role on a temporary basis. *Ibid.* In October 2001, the EEOC granted petitioner a transfer back to Memphis as an administrative judge, which petitioner initially accepted but ultimately declined. *Id.* at 12a-13a.

On June 4, 2002, after completing its investigation, the EEOC issued its final action on petitioner's complaint. Pet. App. 13a. It held that several of his claims were untimely, and found no merit to his claims that, due to discrimination and retaliation for protected activity, (1) his hardship transfer requests to Detroit had been denied, and (2) his promotion from GS 13 to GS 14 had been delayed from December 1999 to January 2000. *Ibid.* The agency concluded that petitioner had not established that other similarly situated individuals had been treated more favorably or that any decisionmaker knew of any protected activity in which he had engaged. *Ibid.* The EEOC determined that petitioner had been promoted on the first day he was eligible and that, even if he could establish a prima facie case of discrimination, he had failed to show that the agency's reason for denying his transfer requests (*i.e.*, the lack of available positions in Detroit) was pretextual. *Id.* at 13a-14a.

2. On August 30, 2002, petitioner filed suit against the EEOC in federal court,[1] alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, and various other federal and state laws and regulations. Pet. App. 14a. The district court granted the EEOC's

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[1] Pursuant to this Court's Rule 35.3, the current Chair of the EEOC, Naomi C. Earp, is automatically substituted as the lead respondent.

motion to dismiss as to all but the Title VII and Rehabilitation Act claims. *Ibid.*

The court later granted summary judgment in favor of the EEOC on the remaining claims. Pet. App. 56a, 71a-74a. The court agreed that petitioner had not made a timely EEO complaint with respect to certain claims, and held that petitioner had presented insufficient evidence to support his various theories of discrimination and retaliation. *Id.* at 71a-74a. The court ruled that the transfer denials were not discriminatory, because (a) no funded administrative judge position existed in Detroit at the times petitioner sought it, (b) the EEOC had legitimate reasons for denying his request to transfer to an investigator position, and (c) petitioner had failed to show that similarly situated persons had been treated more favorably during the time that he was requesting a transfer. *Id.* at 71a-72a. The court also granted summary judgment in favor of the EEOC on petitioner's retaliation claim because he had failed to establish any causal connection between his protected activity and the denial of a transfer. *Id.* at 73a. The court denied petitioner's request for reconsideration. *Id.* at 54a-55a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 30a-53a. The court held that the EEOC had waived its timeliness defense on petitioner's denial-of-transfer claim, *id.* at 42a, but it proceeded to conclude that petitioner had presented insufficient evidence to support that claim. The court first determined that petitioner had "failed to present any direct evidence of discrimination," *id.* at 45a, and then concluded that he could not establish a prima facie case of discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), Pet. App. 45a-47a. The court held that the EEOC's denials of a

transfer to Detroit could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 46a-50a. The court also affirmed the district court's grant of summary judgment on petitioner's retaliation claims. *Id.* at 51a. It rejected his claim that the agency had retaliated against him by denying his transfer requests, reasoning that "the denial of a purely lateral transfer without more is insufficient to constitute an 'adverse employment action' under Title VII." *Ibid.*

4. After the court of appeals issued its ruling, this Court decided *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In *Burlington Northern*, this Court held that Title VII's anti-retaliation provision extends to any action that "a reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citations omitted).

Petitioner filed a petition for certiorari alleging, *inter alia*, that the court of appeals rejected his retaliation claim based on reasoning that conflicted with *Burlington Northern*. See Pet., *Momah* v. *Dominguez*, cert. granted, 127 S. Ct. 933 (2006) (No. 06-368). In response, the government acknowledged that a remand was warranted to permit the court of appeals to apply the *Burlington Northern* standard to petitioner's retaliation claim. See Resp. Br. at 9-10, *Momah*, *supra* (No. 06-368).[2] On January 8, 2007, this Court granted a writ of certiorari, vacated the judgment of the court of ap-

[2] The government argued, however, that certiorari should be denied on the second question petitioner presented, which alleged that the EEOC did not conduct a proper investigation of his EEO complaint.

peals, and remanded the case "for further consideration in light of" *Burlington Northern*. Pet. App. 28a.

5. On remand, the court of appeals affirmed the district court in an unpublished decision. Pet. App. 3a-27a. The court reiterated its prior ruling that the EEOC's denials of petitioner's transfer requests could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 20a-23a. The court found that its objective standard for determining whether a denial of a transfer constituted a "materially adverse change in the terms and conditions of employment" was consistent with the standard applied by other circuits. *Id.* at 20a-21a (internal quotation marks and citation omitted). The court held that, because *Burlington Northern* "was limited to the retaliation provision of Title VII," it did not affect its prior analysis "of adverse employment actions in the context of [petitioner's] discrimination claim." *Id.* at 27a n.6.

The court also reaffirmed the district court's grant of summary judgment on petitioner's retaliation claims. Pet. App. 25a. The court explained that, although *Burlington Northern* "changes our analysis regarding [petitioner's] retaliation claim, it does not change our conclusion that the district court's grant of summary judgment was proper." *Id.* at 4a. The court held that "even assuming, *arguendo*," that the EEOC's denials of petitioner's transfer requests qualified as adverse actions under *Burlington Northern*, petitioner "is still unable to establish a prima facie case of retaliation." *Id.* at 25a. The court found that petitioner could not establish a causal connection between his protected activity and the denials of his transfer requests. *Ibid.* The court noted that petitioner's initial transfer requests in February 1998 and August 1998 were denied before he had

even engaged in any protected activity. *Ibid.* Although the EEOC also denied transfer requests after petitioner engaged in protected activity, petitioner made "no distinction between the conduct of his employer before October 1999 and the allegedly retaliatory conduct." *Ibid.* The court accordingly held that "no causal nexus exists between the employer conduct and the protected activity." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 19-25) that this Court should grant certiorari to resolve a conflict between the unpublished decision of the court of appeals in this case and the decisions of other courts of appeals regarding what type of employer conduct qualifies as an "adverse employment action" sufficient to support a claim of discrimination or retaliation under Title VII. Petitioner articulates no actual conflict of authority in the circuits on this issue and petitioner's fact-based challenges to the court of appeals' unpublished decision do not otherwise warrant this Court's review.

a. Petitioner's allegation of a conflict is seriously undercut by the fact that he fails to distinguish between cases that address discrimination claims and those that address retaliation claims. Most of the court of appeals decisions that petitioner cites (Pet. 21-24) involve only retaliation claims. See, *e.g.*, *Von Gunten* v. *Maryland*, 243 F.3d 858, 863-864 (4th Cir. 2001) (addressing the definition of "adverse employment action necessary to prove a § 2000e-3 retaliation claim"); *Randlett* v. *Shalala*, 118 F.3d 857, 858 (1st Cir. 1997) (holding that "Title VII can offer protection against a *retaliatory* refusal to transfer an employee," but "no evidence existed here to show *retaliation*") (emphasis added); *Bouman* v.

Block, 940 F.2d 1211, 1229 (9th Cir.) (describing what constitutes "an adverse employment decision resulting from retaliation"), cert. denied, 502 U.S. 1005 (1991); see also *Schultz* v. *Alticor/Amway Corp.*, 177 F. Supp. 2d 674, 681 (W.D. Mich. 2001), aff'd, 43 Fed. Appx. 797 (6th Cir. 2002) (citing cases to show a circuit split about what constitutes "adverse employment actions" for purposes of retaliation claims under federal anti-discrimination statutes). But this Court's decision in *Burlington Northern* already resolved the circuit split regarding the proper standard for alleging actionable retaliation under Title VII. All of the cases upon which petitioner relies were decided before *Burlington Northern*, and thus, petitioner cannot show that a split among courts of appeals persists *after* that decision.

In fact, petitioner made an almost identical argument in his petition for certiorari from the court of appeals' first, pre-*Burlington* opinion in this case. Pet. at 13-22, *Momah*, *supra* (No. 06-368). As noted, this Court already granted certiorari, vacated the judgment, and remanded to the court of appeals "for further consideration in light of *Burlington N[orthern]*." Pet. App. 28a. Thus, petitioner has already obtained further review based on *Burlington Northern*. And the court of appeals' unpublished and fact-bound decision resolving this case in the wake of *Burlington Northern* does not merit further review.

b. Although some courts of appeals used to apply the same "adverse employment action" standard to both discrimination and retaliation claims, this Court squarely rejected that approach in *Burlington*. 126 S. Ct. at 2412-2413. As the Court explained, Title VII's "anti-retaliation provision, *unlike the substantive provision* [prohibiting discrimination], is not limited to dis-

criminatory actions that affect the terms and conditions of employment." *Ibid.* (emphasis added). The Court noted that in addition to the differences in language, the differences in purpose between the substantive anti-discrimination provision and the anti-retaliation provision supported its holding that the scope of the anti-retaliation provision is broader: "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," while the "anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Ibid.* Thus, neither a split in authority on the appropriate standard for retaliation claims (which, in any event, has already been resolved), nor this Court's holding in *Burlington Northern* regarding retaliation claims supports petitioner's argument that further review of his *discrimination* claim is warranted. See *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (noting that *Burlington Northern*'s holding is limited to retaliation claims); *Higgins* v. *Gonzales*, 481 F.3d 578, 589 (8th Cir. 2007) (noting the different standards for discrimination and retaliation claims after *Burlington Northern*).

For this reason, petitioner's extensive reliance (Pet. 21-23) on the Ninth Circuit's decision in *Bouman* and the First Circuit's decision in *Randlett* is misplaced. Although those cases addressed whether a transfer or a denial thereof was actionable under Title VII, each of them involved only retaliation claims. See *Randlett*, 118 F.3d at 858, 862-864; *Bouman*, 940 F.2d at 1229. In *Bouman*, the court's discussion of the applicable standard—*i.e.*, that a plaintiff "must show that the [employer] took some action in response to her exercise of Title VII rights"—on its face is relevant solely to retaliation claims, 940 F.2d at 1229, and, more to the point,

has been superceded by this Court's later decision in *Burlington Northern*. 126 S. Ct. at 2415.

In *Randlett*, the First Circuit held that, in light of the facts of that particular case, it could not agree with the employer's view that "a refusal to transfer is automatically outside Title VII." 118 F.3d at 862. The court nonetheless affirmed the district court's grant of summary judgment to the employer because the plaintiff failed to produce sufficient evidence of retaliatory intent. *Id.* at 862-863. That holding does not create a conflict among the circuits regarding whether transfers or denials thereof can constitute actionable discrimination based on a prohibited characteristic under Title VII for several reasons: (1) it arose in the context of a retaliation claim;[3] (2) it is limited to the circumstances of that case; and (3) in any event, to the extent that pre-*Burlington Northern* retaliation cases remain relevant to the First Circuit's disposition of discrimination claims, post-*Randlett* decisions in the First Circuit are consistent with the standard that was applied by the court of appeals below.

In *Marrero* v. *Goya of Puerto Rico, Inc.*, 304 F.3d 7 (2002), for example, the First Circuit reversed a jury verdict in the plaintiff's favor on the ground that her transfer was not an actionable adverse employment ac-

[3] Although *Randlett* stated that Title VII's anti-discrimination and anti-retaliation provisions "[a]rguably * * * should be read together," 118 F.3d at 862, this Court rejected that approach in *Burlington Northern* and held that Title VII's anti-retaliation provision applies to a broader range of employer conduct than does its discrimination provision. 126 S. Ct. at 2412-2414. Although the court of appeals correctly noted below (Pet. App. 27a n.6) that *Burlington Northern* does not affect the standard applied to discrimination claims, any discussion of the proper standard for discrimination claims in *Randlett* is necessarily dicta because the court addressed only a retaliation claim.

tion as a matter of law. *Id.* at 23-25. The court cited *Kocsis* v. *Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996)—also relied upon by the court of appeals below (Pet. App. 20a)—for the proposition that "[r]e-assignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Marrero*, 304 F.3d at 23 (quoting *Kocsis*, 97 F.3d at 885). Although the First Circuit noted that "courts have rejected any bright line rule that a transfer cannot qualify as an 'adverse employment action' unless it results in a diminution in salary or a loss of benefits," it held that the plaintiff had failed to produce sufficient evidence to "prove that, viewed *objectively*, this transfer was an adverse personnel action." *Id.* at 24-25.

Similarly, in *Simas* v. *First Citizens' Federal Credit Union*, 170 F.3d 37 (1999), the First Circuit explained that "[d]etermining whether an action is materially adverse necessarily requires a *case-by-case* inquiry," and that such inquiry "must be cast in objective terms." *Id.* at 49-50 (internal quotation marks and citation omitted). Accordingly, the First Circuit's case law, viewed as whole, is consistent with the holding of the court of appeals in this case that an objective test should be used to determine whether an employment action is sufficiently adverse to constitute actionable discrimination under Title VII. See Pet. App. 21a-22a. And, in any event, the First Circuit may have occasion to further clarify its case law in the wake of *Burlington Northern*.

c. Although petitioner cites some court of appeals decisions that involve discrimination claims, they fail to advance his argument. For example, he cites (Pet. 21) *Ledergerber* v. *Stangler*, 122 F.3d 1142 (8th Cir. 1997), for the proposition that unlike other circuits, the Fifth

and Eighth Circuits require a plaintiff to show an ultimate employment action in order to state a claim under Title VII. But the adoption of that standard—under which a plaintiff cannot proceed unless he has suffered an "ultimate employment action" such as a discharge, a failure to hire or promote, or a reduction in compensation—would not help petitioner. To the contrary, the "ultimate employment decision" standard is stricter than the Sixth Circuit's requirement that petitioner show a "materially adverse change in the terms and conditions of [his] employment." Pet. App. 20a (internal quotation marks omitted). Thus, even assuming that the Fifth or Eighth Circuit continues to apply an "ultimate employment decision" standard that differs in practice from the standard applied by other courts of appeals,[4] petitioner would not benefit from its application to his case.

Petitioner's citation (Pet. 24) of the Seventh Circuit's decision in *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270 (1996), also fails to advance his claim. In *Wil-*

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[4] It is unclear to what extent, if any, the Fifth and Eighth Circuits continue to apply a stricter "ultimate employment action" standard. For example, in a recent decision that post-dates *Burlington Northern*, the Eighth Circuit analyzed whether a plaintiff's transfer was "an adverse employment action" without mentioning the "ultimate employment decision" standard; instead, it examined whether the plaintiff suffered a "material employment disadvantage." *Higgins*, 481 F.3d at 584 (internal quotation marks omitted). And while the Fifth Circuit continues to refer to the "ultimate employment decision" standard, it recently reiterated that "[t]o be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 613 (2007) (internal quotation marks omitted).

liams, the court held that a plaintiff must show a "materially adverse employment action" to establish actionable discrimination or retaliation, and that a "transfer involving no reduction in pay and no more than a minor change in working conditions" is not sufficient. 85 F.3d at 273-274. Petitioner attempts (Pet. 24) to show a conflict between *Williams* and other circuits by citing to *briefs* filed in other courts of appeals rather than decisions of those courts.[5]

In short, petitioner has failed to demonstrate a conflict between the holding of the court of appeals in its unpublished decision below and the holding of any other court of appeals or any decision of this Court with respect to his discrimination claim. Cf. Pet. App. 20a-21a (court of appeals notes that its standard is consistent with other courts of appeals and cites cases from eight other circuits). Nor has he demonstrated any post-*Burlington Northern* conflict with respect to retaliation claims or any reason why this Court should revisit *Burlington Northern* just a few Terms after it issued that decision. Moreover, the court of appeals' application of its legal standard to the circumstances of his case is a fact-bound determination that does not warrant this Court's review.[6]

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[5] The briefs cited by plaintiff were filed in cases that do not further his argument. In one case, the Eleventh Circuit affirmed the district court's judgment in a one-word, non-precedential decision. *Boykin* v. *City of Mobile*, 180 F.3d 271 (1999) (table). In the other case, the Third Circuit held that the denials of the plaintiff's transfer requests did *not* constitute a "materially adverse employment decision" sufficient to support his claim of discrimination. *Fallon* v. *Meissner*, 66 Fed. Appx. 348, 351-352 (2003).

[6] Even assuming *arguendo* that the court of appeals improperly determined that petitioner had failed to establish a prima facie case of

2. Petitioner further contends (Pet. 25-34) that this Court should grant certiorari to review the court of appeals' determination that he failed to establish a causal connection between his protected activity and the EEOC's denial of his requests for a transfer. In particular, petitioner argues (Pet. 27-30) that the court of appeals' decision conflicts with this Court's decisions in *Burlington Northern*; *Clark County School District* v. *Breeden*, 532 U.S. 268 (2001); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); and *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007). But none of those cases conflicts in any respect with the court of appeals' holding that, based on the summary judgment record in this case, petitioner failed to establish a causal connection between his protected activity and the EEOC's challenged conduct. As an initial matter neither *Mt. Healthy* nor *Wilkie* involved a retaliation claim under Title VII or any other federal anti-discrimination statute. In *Mt. Healthy*, the Court addressed claims under the First and Fourteenth Amendments. 429 U.S. at 276. And in *Wilkie*, this Court refused to infer from the Constitution a new cause of action for damages against government officials who retaliate

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discrimination, this case would be inappropriate for certiorari because the court of appeals' decision that the EEOC was entitled to summary judgment is correct on other grounds. As the district court properly held (Pet. App. 71a-73a), the EEOC advanced legitimate, non-discriminatory reasons for its actions, and petitioner failed to present evidence sufficient to raise a genuine issue of material fact with respect to any of the agency's proffered reasons. As the district court found, when petitioner applied for his transfers to the administrative judge position in Detroit, that position was not funded, and thus the EEOC could not fill it. And, with respect to the investigator position, the agency presented "substantial legitimate reasons for not granting [petitioner] that position," which petitioner failed to rebut. *Id.* at 71a-72a.

against the exercise of land-ownership rights. 127 S. Ct. at 2597-2605.

In *Burlington Northern*, this Court said nothing about the causation element of a prima facie case of retaliation; rather, its analysis was limited to determining what type of employer conduct constitutes actionable retaliation under Title VII. See 126 S. Ct. at 2412-2416.[7] And in *Clark County*, this Court, in holding that employer action taken 20 months after protected activity "suggests, by itself, no causality at all," observed that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." 532 U.S. at 273-274 (internal quotation marks and citation omitted). Thus, the only holding in *Clark County* is that 20 months is *not* sufficiently close to suggest causality.

Here, the court of appeals correctly ruled on the particular facts before it that petitioner failed to demonstrate any causal connection between the EEOC's denial of his request to transfer to Detroit and his engagement in protected activity; it did not purport to create a gen-

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[7] Petitioner's claim (Pet. 25-26) that the court of appeals "did not believe" that he "suffered an adverse employment action" under this Court's decision in *Burlington Northern* for purposes of his retaliation claim misunderstands the court's use of the phrase "assuming, *arguendo*," Pet. App. 25a. The court did not make any findings with respect to whether the denials of petitioner's transfer requests met the standard set forth in *Burlington Northern*, nor did it impose an "ultimate employment action" standard; to the contrary, the court assumed (without deciding) that petitioner had met *Burlington Northern*'s standard, and proceeded to decide the entirely separate issue of whether petitioner had met the causation element of a prima facie case of retaliation. *Ibid.*

eral rule that would govern other cases. Rather, the court's decision merely recognizes that an employment action that *pre-dates* protected activity cannot be retaliatory and thus, if an employer's challenged conduct (here, the continued denial of his requests for a transfer to Detroit) does not change after an employee files an EEO complaint, no causal connection can be inferred unless the employee provides evidence that retaliation motivated the challenged conduct that occurred after the protected activity. The court's fact-bound determination on causation, based on the record in this case, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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